

EX PARTE OR LATE FILED



MCI Telecommunications  
Corporation

1801 Pennsylvania Avenue N.W.  
Washington, D.C. 20006  
202 887 2727

Larry A. Blosser  
Senior Regulatory Attorney  
Regulatory Law

ORIGINAL  
FILE

RECEIVED

JAN - 4 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

January 4, 1993

EX-PARTE

ORIGINAL  
FILE

Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

RE: CC Docket No. 92-91  
ONA Access Tariff Investigation

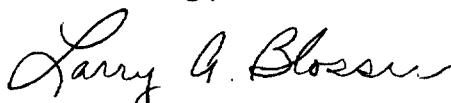
Dear Ms. Searcy:

Enclosed is a copy of a motion dated December 17, 1992, filed by US WEST Communications, Inc. before the Public Utility Commission of Oregon in Case Number UM 351.

MCI Telecommunications Corporation respectfully requests that the enclosed motion, together with the exhibits thereto, be included in the record of CC Docket No. 92-91.

Please refer any questions or correspondence concerning this request to the undersigned.

Sincerely,

  
Larry A. Blosser

cc (w/enclosures): Stan Wiggins  
Steve Spaeth  
All parties of record

No. of Copies rec'd  
List A B C D E

041

U S WEST Communications  
421 SW Oak Street Suite 8N1  
Portland, Oregon 97204  
503 242-5541

Charles L. Best  
Chief Counsel - Oregon

**U S WEST**  
COMMUNICATIONS @

RECEIVED

JAN - 4 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

December 17, 1992

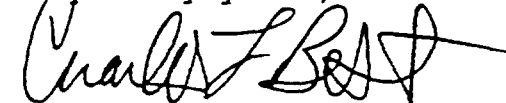
Mr. Samuel Petrillo  
Hearings Officer  
Proceedings Division  
Oregon Public Utility Commission  
550 Capitol Street, N.E.  
Salem, OR 97310-1380

Re: UM 351

Dear Hearings Officer Petrillo:

Enclosed for filing are an original and four copies of  
U S WEST Communications, Inc.'s MOTION FOR ADDITIONAL PROTECTION  
in the above referenced docket, along with a certificate of  
service.

Very truly yours,



Charles L. Best

Enclosure

cc: All parties of record

RECEIVED

JAN - 4 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 351

In the Matter of Procedures ) MOTION FOR ADDITIONAL  
Relating to Cost Workshops ) PROTECTION AND OPPOSITION  
Investigating Costs of ) TO MCI'S MOTION TO COMPEL  
Telecommunications Services )

Pursuant to OAR 860-11-000(3), ORCP 36(C), and Order  
No. 91-500, Appendix A, paragraph 16, U S WEST Communications,  
Inc. (USWC) respectfully requests the Commission to provide  
additional protection prohibiting the release of certain  
vendor specific cost information in USWC's Switching Cost  
Model (SCM) to MCI.

The parties and persons involved include MCI,  
American Telephone & Telegraph Company (AT&T), (AT&T Network  
Systems group), Ericsson Network Systems, Inc. and Northern  
Telecom, Inc. (NTI). The information involves USWC's  
Switching Cost Model (SCM). The information also involves the  
cost of switching equipment provided to USWC by Ericsson, NTI  
and AT&T which are specific inputs to the SCM Model. USWC  
requests the Commission to grant additional protection for  
this information by limiting access to the cost model to USWC  
premises only and not release the vendor specific inputs to  
MCI or any other party. USWC and the vendors consider this  
information highly proprietary and USWC is under a contractual  
obligation not to disclose the information. USWC believes  
that MCI's purposes can be served by the use of a redacted

Page 1 UM 351 - USWC'S MOTION FOR ADDITIONAL PROTECTION

1 version of the cost model in analyzing USWC's costs in UM 351.  
2 The relief requested is necessary because of the extreme  
3 sensitivity of the information contained in the model, the  
4 rights of the switch vendors to protect the information, the  
5 precedent releasing the information would set in other  
6 jurisdictions, USWC's contractual obligation to keep the  
7 information confidential, and the risk that Commission  
8 compelled disclosure of the vendor information will lead  
9 vendors to decline to provide their information in the future  
10 thereby crippling the process of developing telecommunications  
11 costs.

12 1.           The inputs qualify as trade secret or confidential  
13               commercial information.

14           The Commission has recognized the test set out in  
15 the Restatement of Torts and Waelde v. Merck, Sharp and Dohme,  
16 94 FRD 28 (1981), as the appropriate standard to analyze what  
17 constitutes trade secret or confidential information in the  
18 context of Commission proceedings. Among the factors to be  
19 considered in making this determination are: 1.) The extent  
20 to which the information is known outside the applicant's  
21 business; 2.) The extent to which the information is known by  
22 employees and others involved in the business; 3.) The  
23 measures taken by Applicant to guard the secrecy of the  
24 information; 4.) The value of the information to the Applicant  
25 or its competitor; 5.) The amount of effort or money expended  
26 in developing the information; and 6.) The ease or difficulty

Page

2 UM 351 - USWC'S MOTION FOR ADDITIONAL PROTECTION

1 with which information could be properly acquired to develop  
2 by others. As the affidavit of Robert H. Brigham  
3 demonstrates, the vendor specific inputs to the cost models  
4 clearly qualify as trade secrets and in fact are so sensitive  
5 that they should be granted additional protection from any  
6 form of disclosure. Mr. Brigham's affidavit is attached as  
7 Exhibit A.

8           The FCC recently wrestled with this very issue in  
9 its investigation of the cost support material to be filed  
10 with open network architecture access tariffs. In Order No.  
11 92-129, the FCC declined to give MCI the same information they  
12 are now seeking from the Oregon Commission citing the extreme  
13 sensitivity of the information and the desire to continue to  
14 have the switched vendors cooperatively provide their input in  
15 the creation of costing models. The FCC's decision is  
16 attached as Exhibit 1 to Mr. Brigham's affidavit (Exhibit A).

17           MCI's stated need for the information is nothing  
18 new. MCI has used the same arguments before the FCC and other  
19 state Commissions. MCI states that,

20           "If MCI does not gain access to the model in order  
21           to test its sensitivity to various assumptions, MCI  
22           may withhold its support from the cost results being  
            produced by USWC in UM 351 based on the likely  
            recommendation of Dr. Cornell."

23           In fact, MCI was offered an opportunity to test the  
24           sensitivity of the model to various assumptions. The workshop  
25           set up a SCM audit session in Denver on December 2, 1991. MCI  
26           specifically was invited to this session and did not attend.

Page

3 UM 351 - USWC'S MOTION FOR ADDITIONAL PROTECTION

1           To USWC's knowledge, MCI has never obtained the  
2 vendor specific information in any state or at the Federal  
3 level. Should the Commission allow MCI to have the  
4 information in Oregon, it will undermine the decisions of  
5 other Commissions to protect these specific inputs from  
6 disclosure.

7 2.           The information sought is not USWCs.

8           In Order to develop its cost models, USWC needed to  
9 use cost of switching equipment acquired from various vendors  
10 to determine the cost for providing service. In order to  
11 obtain this information, USWC had to sign Agreements with each  
12 of the switch vendors and agree not to release the information  
13 without their specific approval. Copies of those agreements  
14 are attached as Exhibit B. Unfortunately, USWC finds itself  
15 in a position of having to defend the confidentiality of  
16 information that actually belongs to third parties who are  
17 likely not subject to the Commission's jurisdiction. USWC has  
18 notified the switch vendors of MCI's Motion to Compel and  
19 expects the Commission will also hear separately from them  
20 about their desires to keep the information confidential.

21           Since the information MCI seeks is not the property  
22 of a regulated utility subject to the Commission's  
23 jurisdiction, the Commission should act very cautiously before  
24 releasing the information. As the FCC noted in Order No.  
25 92-129, the cooperation of the switch vendors is necessary to  
26 ensure that appropriate costs for telecommunications services

Page

4 UM 351 - USWC'S MOTION FOR ADDITIONAL PROTECTION

1 can be accurately developed. Both MCI and ratepayers  
2 generally will be worse off if accurate costs for  
3 telecommunications service cannot be developed because switch  
4 vendors are reluctant to provide their input for cost  
5 development.

6 3. The relevance of the information is outweighed by  
7 its sensitive nature

8 USWC also objects to MCI's request for the  
9 information as not being relevant. MCI has been offered a  
10 redacted version of the SCM Model without the specific switch  
11 vendor inputs. MCI has a legitimate concern in wanting to  
12 evaluate how USWC costs its telecommunications services. A  
13 redacted version of the SCM Model should provide that. MCI  
14 could use the redacted version of the of the Model to insert  
15 "dummy" information to determine how various scenarios would  
16 vary the cost outputs. MCI has declined that offer yet has  
17 not established why the specific inputs are necessary in order  
18 to evaluate USWC's costing methodology. Clearly, without an  
19 additional showing, MCI cannot establish that the relevance of  
20 the specific inputs are outweighed by the prejudice which may  
21 be suffered by the switch vendors and USWC if the information  
22 is allowed to be released even under a Protective Order.

23 SUMMARY

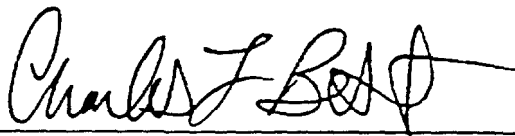
24 The Commission should allow additional protection  
25 for USWC's SCM model and limit its review to USWC's premises.  
26 The Commission should further deny any release of specific

Page

5 UM 351 - USWC'S MOTION FOR ADDITIONAL PROTECTION

1 switching vendor inputs used in the SCM model. The  
2 information is extremely sensitive due to the highly  
3 competitive nature of the switching equipment market place.  
4 Should the Commission decide to release the information even  
5 under a Protective Order, such a decision would undermine  
6 decisions in other jurisdictions not to release the  
7 information and may cause switch vendors to think twice about  
8 providing necessary information to telecommunications  
9 utilities if they believe that information will be released to  
10 the public or potential competitors. MCI has failed to  
11 demonstrate that they cannot participate meaningfully in  
12 UM-351 without the specific inputs. In fact, the redacted  
13 version of the SCM Model would allow MCI to analyze how USWC  
14 employs its costing methodology, which is the very heart of  
15 UM-351. Therefore, USWC requests that the Commission grant  
16 this information additional protection and deny MCI's Motion  
17 to Compel.

18               RESPECTFULLY submitted this 17th day of December,  
19 1992.

20  
21 By:   
22       CHARLES L. BEST  
23       Of Attorneys for U S WEST  
24       Communications, Inc.  
25  
26



BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

UM 351

In the Matter of Procedures	)	AFFIDAVIT OF
Relating to Cost Workshops	)	ROBERT H. BRIGHAM
Investigating Costs of	)	IN SUPPORT OF
Telecommunications Services	)	ADDITIONAL PROTECTION

STATE OF COLORADO)

) ss:  
County of Denver )

I Robert H. Brigham, being first duly sworn, depose and say:

I.

I am Director - Economic Analysis for U S WEST Communications (USWC), and have personal knowledge of the facts in this affidavit;

II.

The purpose of this affidavit is to demonstrate that additional protection is required for USWC's Switching Cost Model (SCM). USWC seeks to limit access to the model and documentation to those individuals in UM 351, other than Staff, who are qualified persons under the protective order and that review of the confidential information occur only on USWC premises under the supervision of USWC personnel. Copies of the documentation and/or model should not be made available. In addition, vendor proprietary information must be redacted from the documentation and/or model unless a qualified person has written permission from the vendor to review that vendor's information. USWC is contractually obligated to not release

1 vendor proprietary information without specific approval of the  
2 vendor(s) involved.

3 Detailed cost model/methodologies of competitors or  
4 others in the telecommunications industry are treated as trade  
5 secrets and are not available to USWC. Similarly, USWC's  
6 detailed SCM and its documentation should not be made available  
7 to USWC's competitors and others in the telecommunications  
8 industry without the additional protection as requested by USWC.

9 The following supports the claim that USWC's SCM is  
10 confidential and meets the criteria recognized by Oregon and  
11 Federal Courts and required by Oregon Procedures for additional  
12 protection.

13  
14 TRADE SECRET OR CONFIDENTIAL COMMERCIAL INFORMATION

15 III.

16 Switching Cost Model

17 The Switching Cost Model (SCM) is a group of computer  
18 models that is used by USWC to estimate recurring switching  
19 costs of specific services and network "building blocks" (as  
20 defined in Oregon docket UM 351) that are provided by USWC;

21 1. Extent to which this information is known outside  
22 USWC.

23 USWC's SCM is designed to calculate the forward looking  
24 costs associated with various switching functions. The  
25 distribution of customer data which is processed against  
26 engineering designs are derived from USWC's own operations and  
27 are not known by others outside USWC. These models took years

1 to develop and accumulate. The proprietary and original  
2 programming and the proprietary inputs are not known by persons  
3 outside USWC.

4 Inputs to the SCM model include data on switching  
5 equipment that USWC is contractually obligated to keep secret by  
6 reason of agreements with the vendors of such equipment, who are  
7 AT&T Technologies, Ericsson Network Systems, and Northern  
8 Telecom, Inc.

9 2. Extent to which this information is known to  
10 employees of USWC.

11 SCM's proprietary and original programming, algorithms,  
12 supporting documentation, manuals and inputs are known, within  
13 USWC, only to a select group of persons responsible for the  
14 design and maintenance of the model. The group is limited to  
15 approximately 5 people.

16 The FCC recently recognized the extremely sensitive  
17 nature of SCM by only allowing an independent auditor to review  
18 the model and provide a redacted report to other parties. See  
19 Exhibit 1.

20 USWC and its predecessor companies have spent  
21 approximately seven years and \$3 million, to develop SCM. USWC  
22 assembled a team of ten experts in programming, costing and  
23 switch design, to develop appropriate methodologies, and to  
24 construct and document the SCM. Replacement cost would be  
25 higher today, and would reflect the same seven year development time.

26 3. Extent of USWC's efforts to guard the secrecy of this  
27 information.

1 USWC diligently protects the secrecy of the SCM and its  
2 documentation. One system administrator is responsible for  
3 managing the model. This administrator controls access to the  
4 model, its source and compiled code, and the input and output  
5 databases. The administrator is responsible to see that no  
6 unnecessary internal distribution and no external distribution  
7 of the model information is made. The system administrator and  
8 all users of the system are required to sign annually, as a  
9 condition of continued employment, an agreement binding them to  
10 maintain the secrecy of company information including  
11 proprietary information about these models. The computers on  
12 which the model operates, the physical media containing the  
13 software, and the written source code, are kept in secure,  
14 access-controlled buildings. The source code is kept in a  
15 locked cabinet.

16 4. Value of this information to USWC and to competitors.

17 The source code, algorithms and other information  
18 resident in SCM is considered extremely valuable and  
19 competitively sensitive to USWC.

20 SCM has market value as a commercial product. USWC  
21 estimates that the market value of licenses to use SCM is \$5.85  
22 million. Disclosure of this information would destroy the  
23 market value of USWC's own intellectual property.

24 Other telecommunications companies who are often direct  
25 competitors of USWC, may not have developed economic cost models  
26 of their own. They could save significant research dollars by  
27 replicating SCM to meet their own regulatory and internal needs,

1 since the cost of replicating and enhancing the SCM is  
2 significantly less than the cost of developing a new system from  
3 scratch. In addition, consultants in the telecommunications  
4 industry, if given unrestricted access to the model, could  
5 replicate the basic USWC SCM and add minor enhancements which  
6 reflect the philosophies which they espouse. This information  
7 could be sold to clients or used on behalf of clients by  
8 consultants resulting in financial gain.

9 The proprietary vendor specific information, if  
10 disclosed, would allow one or more of the switch vendors to  
11 learn information about their competitor's products that would  
12 otherwise be unavailable, giving the recipient an unfair  
13 advantage in the marketplace. For example, the release of this  
14 information would unfairly aid the recipient, since it would  
15 expose the pricing strategies employed by the other vendors. As  
16 noted earlier, USWC has signed agreements with the switch  
17 vendors that this information will not be disclosed to others  
18 unless specifically approved in writing by the vendor.

19 The SCM inputs, algorithms and other related information  
20 would be valuable to USWC's competitors, and could be used to  
21 gain an unfair advantage over USWC in the marketplace. USWC  
22 uses the SCM to produce costs for its services and network  
23 "building blocks" (as defined in Oregon docket UM 351). This  
24 data is used as a key input in the pricing of these services or  
25 building blocks. Using this data, a competitor could estimate  
26 USWC's costs and then anticipate USWC's pricing strategies.  
27 Thus, the competitor could develop a preemptive pricing strategy

1 based on an unfair competitive advantage. Of course, as  
2 mentioned above, the competitor could also use the SCM to  
3 estimate their own costs, at a fraction of the cost of either  
4 building their own model, or purchasing a model.

5 5. Amount of USWC effort and cost expended to develop  
6 the information.

7 USWC has spent seven years and approximately \$3 million  
8 in developing the SCM. The model has been continuously  
9 maintained since its inception. The model has also been  
10 improved over time to enhance its usefulness as a business tool.  
11 The annual cost to maintain the SCM is approximately \$475,000.

12 6. The ease or difficulty with which others can properly  
13 duplicate or acquire this information.

14 It would be difficult if not impossible for others to  
15 properly acquire the same information contained in USWC's SCM.  
16 Information on USWC's network designs is not known elsewhere.  
17 The proprietary programming which integrates some widely  
18 accepted and applied principles of costing and economics, with  
19 these elements, is itself not capable of being replicated  
20 without knowledge of the proprietary USWC information discussed  
21 above. Also, as stated earlier, the cost to develop the SCM is  
22 \$3 million, and maintenance and security exceeds \$475,000.

23  
24 Dated this 16th day of December, 1992.

25  
26   
27 Robert H. Brigham

Director - Economic Analysis

BEFORE ME came this 6<sup>th</sup> day of December, 1992, Robert H. Brigham, who being first duly sworn, stated that the facts in the foregoing affidavit were true.

Dani Th. Th. Gupta  
NOTARY PUBLIC in and for the  
state of Colorado residing at

My Commission expires:

March 16, 1995

Before the  
Federal Communications Commission  
Washington DC 20554

In the Matter of

Commission Requirements for Cost  
Support Material To Be Filed with  
Open Network Architecture  
Access Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1992; Released: January 31, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a companion *Investigation Order* adopted today,<sup>1</sup> the Common Carrier Bureau commences an investigation of the initial Open Network Architecture (ONA) tariffs filed November 1, 1991 by the Bell Operating Companies (BOCs),<sup>2</sup> and consolidates that investigation with the previously established investigation of the Ameritech ONA tariff.<sup>3</sup> The present Order specifies procedures for the further examination, both by an independent auditor and by parties to the ONA tariff investigation, of proprietary cost models and associated materials filed in support of those tariffs, and for the subsequent consideration of these parties' analyses and comments in the investigation.

2. The ONA tariffs all rely on computer models to apportion the investment represented by central office switching equipment between the multiple switch functions used to provide unbundled services. The computer models, in turn, are intimately dependent upon competitively sensitive materials furnished by switch vendors to Bellcore,<sup>4</sup> which maintains and licenses the Switching Cost Information System (SCIS) model used by all but one of the BOCs.<sup>5</sup>

3. The Commission's established practice is to require public filing of cost support for tariffs.<sup>6</sup> In the ONA context, the Bureau has sought from the outset to assure the fullest practicable access to these materials by entities that will use the unbundled ONA structure and services. Thus, the Bureau (TRP Order<sup>7</sup> that these models and related materials be fully disclosed as part of ONA tariff filings. The BOCs responded with petitions for waiver of the SCIS disclosure requirements of that Order, claiming that disclosure would both endanger proprietary Bellcore software and sensitive switch vendor materials, and ultimately obstruct the implementation of ONA (as switch vendors would decline to provide sensitive materials for use in such models rather than risk unprotected disclosure). These contentions were supported by Bellcore and the switch vendors.

4. The Bureau initially required a provisional, *in camera* submission by Ameritech of its SCIS materials, to enable an informed determination both of the asserted proprietary nature of the materials, and an improved understanding of their role in the carriers' ONA ratemaking process.<sup>8</sup> After *in camera* review of Ameritech's SCIS model and its role in ONA ratemaking, the Bureau determined that these materials are competitively sensitive and exempt from mandatory disclosure processes, as explained in the *SCIS In Camera Order*,<sup>9</sup> and required other BOCs to submit full SCIS materials for *in camera* review.<sup>10</sup> Although the *SCIS In Camera Order*

<sup>1</sup> Open Network Architecture Tariffs, DA 92-128, released Jan. 31, 1992 (Com.Car.Bur.).

<sup>2</sup> The Bell Operating Companies are the operating companies of Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), and US West Communications, Inc. (US West).

<sup>3</sup> Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2 (Open Network Architecture), DA 91-1633, Dec. 27, 1991 (Com.Car.Bur.).

<sup>4</sup> Bell Communications Research, Inc. (Bellcore) was created (originally under the name "Central Staff Organization") from the Bell Laboratories division of the unified Bell System at the time of divestiture, and is owned by the post-divestiture BOCs. *United States v. AT&T*, 552 F. Supp. 131, 142 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The Commission has previously exercised authority over Bellcore through its jurisdiction over the BOCs. See Consolidated Application of AT&T and Specified Bell System Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application, Memorandum Opinion, Order and Authorization, 96 F.C.C. 2d 18 (1983). Thus, we do not consider

Bellcore's assertions of interests warranting protection from disclosure as having any independent status beyond similar assertions by its owners.

<sup>5</sup> US West does not rely on SCIS for the development of BSE direct costs, but instead uses its own model, the Service Cost Model (SCM). Ameritech, in addition to SCIS, relies on a similar cost model, Common Channel Switching Cost Information System (CCSCIS), for the development of direct costs for the Remote Activation of Message Waiting--Expanded element. Hereafter, we use the term SCIS to refer to these and any other corresponding computer models used by BOCs to develop direct Basic Service Element (BSE) costs for ONA implementation.

<sup>6</sup> See 47 C.F.R. §§ 0.451(a), 0.455(b)(11); 47 C.F.R. §§ 61.38, 61.49.

<sup>7</sup> Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, 6 FCC Rcd 5682 (Com.Car.Bur. 1991) (TRP Order), *pet'n for clarification or recon. pending*.

<sup>8</sup> Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs (Ameritech In Camera Submission), Order, DA 91-1309, Oct. 18, 1991 (Com.Car.Bur.).

<sup>9</sup> Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs (In Camera Submissions), DA 91-1592, Dec. 23, 1991 (Com.Car.Bur.) (*SCIS In Camera Order*).

<sup>10</sup> Bell Atlantic, BellSouth, Nevada, Pacific, Southwestern, and US West filed copies of their SCIS materials on December 30, 1991. NYNEX filed its SCIS information on January 8, 1992.



"determined that the full SCIS model and supporting documentation, as well as associated BOC materials and vendor data, should not be available for public inspection,"<sup>11</sup> that Order states that we "will determine questions relating to restricted access by active participants in this Commission proceeding in a subsequent Order."<sup>12</sup> This Order addresses that access question.<sup>13</sup>

## II. BACKGROUND

5. The *Part 69 ONA Order* authorizes local exchange carriers to use a flexible, cost-based approach for pricing new, and newly unbundled, ONA services.<sup>14</sup> Under this standard, the Commission requires price cap carriers to support new service offerings with cost support that: (1) satisfies the net revenue test; (2) identifies the direct costs of the new service; (3) includes an appropriate level of overhead costs; and (4) provides ratios of direct unit cost to unit investment, and direct unit cost to unit price. These materials, especially (2) and (4), enable the Commission to evaluate the reasonableness of the resulting rates.<sup>15</sup>

6. The *TRP Order* describes specific data formats for basic cost, demand, and rate information to be submitted by BOCs filing tariffs that implement their Open Network Architecture (ONA) plans, including the direct costs associated with each Basic Service Element (BSE).<sup>16</sup> The development of BSE direct costs is in turn substantially dependent upon the Switching Cost Information System (SCIS) developed and maintained by Bellcore, and other, similar computer models used by the BOCs to apportion joint and common switching costs between individual BSEs. These models are complex assemblies of mathematical expressions which, in the aggregate, simulate the actual switch's operations and enable the division of its generic functions and attendant costs into specific features and functions provided as ONA elements. During the switch simulation process used to develop unit investment

figures, the SCIS model operates upon technical and cost specifications of particular switch technologies, and several carrier-determined variables. BOC-defined applications of switch technologies thus generate a functional and cost model of the switch's actual operating characteristics.

7. The SCIS model itself consists of algorithms developed and maintained by Bellcore, but the accurate development of these algorithms, as well as the operation and revision of the software, necessarily entail reliance on input data supplied by the BOCs and switch vendors. SCIS outputs constitute investment figures oriented to the eventual replacement cost of the switch. These investment figures for specific switch types are then aggregated across the different switches in a carrier's study area to generate the BOC's direct costs for specific basic service elements. Direct costs are then used as a component in the BSE rate development process. Bellcore licenses the SCIS model to BOCs and some non-BOC exchange carriers, subject to confidentiality agreements.<sup>17</sup>

8. The *TRP Order* provided that carriers unable to furnish the data required by that Order could file applications for waiver.<sup>18</sup> On September 27, 1991, the Bell Operating Companies (BOCs) filed petitions for waiver of several aspects of the Bureau's *TRP Order*, including requests by all BOCs for waiver of filing requirements for SCIS. On October 4, 1991, American Telephone and Telegraph Company (AT&T), Ericsson Network Systems Inc. (Ericsson), MCI Telecommunications Corporation (MCI), and Northern Telecom Inc. (Northern Telecom) filed comments on the BOCs' waiver petitions. *infra*. In their petitions for waiver the BOCs contend that the SCIS model, as well as inputs to the model supplied by the BOCs and switch vendors, and output reports generated by SCIS cost studies, all constitute proprietary materials that should be withheld from public disclosure.

with a Motion to Accept Late Submission of Materials for *In Camera* Inspection. NYNEX claims it was unable to comply with the *SCIS In Camera Order* because personnel needed to review the filing for completeness and accuracy were unavailable due to previously scheduled vacations or other personal reasons. Because the Bureau was able to begin our review of materials filed by other BOCs, and third parties were not prejudiced because they were not entitled to review this material, we grant NYNEX's motion.

<sup>11</sup> *SCIS In Camera Order* at para. 2.

<sup>12</sup> *Id.*

<sup>13</sup> Requests for waiver of the *TRP Order* requirements in several respects not involving issues of SCIS disclosure were resolved in earlier Orders. The *Ameritech TRP Waiver Order* resolved Ameritech's waiver requests not involving SCIS issues. See Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1309, released Oct. 18, 1991 (Com.Car.Bur.) (*Ameritech TRP Waiver Order*), Erratum, DA 91-1345, released Oct. 28, 1991. See also Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1346, released Oct. 29, 1991 (Com.Car.Bur.) (*Non-SCIS TRP Waiver Order*). The scope of the present Order is limited to the SCIS model, and associated inputs and output reports. Although Ameritech's petition is summarized in the *Ameritech TRP Waiver Order* rather than here, we do consider Ameritech's arguments here.

<sup>14</sup> *Part 69 ONA Order*, 6 FCC Rcd at 4531, para. 38.

<sup>15</sup> In addition, the Order permits a carrier to include "risk

premiums" the carrier believes it needs to supplement its rate of return for risky new services. *Id.* at 4531, paras. 42-44. Because BSEs unbundled from feature group arrangements will be offered as alternatives to those arrangements during the transition to a fully unbundled ONA rate structure, they constitute new offerings under price cap criteria. *Id.* at 4529, para. 25.

<sup>16</sup> The Commission specified the rate elements and corresponding cost support demonstration required to implement the BOCs' ONA plans in the *Part 69 ONA Order*. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

<sup>17</sup> NYNEX Petition at 2; see also Bellcore Memorandum at 1-2. Several of the BOCs attach to their waiver petitions a memorandum from Bellcore discussing the proprietary nature of SCIS. They also attach an affidavit from the Bellcore employee responsible for maintaining SCIS. See Bell Atlantic, NYNEX, and Pacific Petitions. Pacific relies on this memorandum and affidavit to demonstrate the proprietary and trade secret status of SCIS. Pacific Petition at 5. Southwestern incorporates the Bellcore memorandum, but does not refer to the specifics of that memorandum. Southwestern Petition at 3.

<sup>18</sup> *TRP Order* at para. 24.

9. Although we have determined that the SCIS model and inputs to the SCIS model should not be open to unrestricted public inspection,<sup>19</sup> such information must be made available to parties to the ONA tariff investigation to the maximum extent consistent with appropriate safeguards against competitive harm.<sup>20</sup> As one element in our bifurcated approach to SCIS disclosure, therefore, we require that BOCs provide their operational software packages to these parties, albeit with precautions in the form of redactions and a nondisclosure agreement that will protect switch vendors and the software's owners, the BOCs, against competitive harm. Proprietary BOC materials used as inputs to SCIS will also be disclosed to parties who sign the prescribed nondisclosure agreement.

10. The second element of our protected disclosure mechanism is an independent audit of SCIS materials that are too competitively sensitive to disclose even under such nondisclosure arrangements. The algorithms actually constituting SCIS, as well as the technology-specific SCIS output reports and the BOC procedures used to aggregate these reports to study area scale, will be disclosed only to independent auditors, who must sign a separate nondisclosure agreement. Parties will, however, have the opportunity to submit questions for the independent auditor.

### III. DISCLOSURE OPTIONS

11. The *SCIS In Camera Order* determined that the SCIS model and associated data from switch vendors constitute confidential materials exempt from disclosure under the FOIA and the Commission's implementing regulations. This Order considers the extent to which the public interest nonetheless supports disclosure of these materials in the exercise of agency discretion, and methods by which adverse effects from disclosure can be avoided or minimized. In the present context, no purpose would be served by repeating the arguments made in the BOCs' waiver requests for categorical nondisclosure of these materials. Instead, we summarize the carriers' proposed alternatives for protected or limited disclosure, and arguments for disclosure raised by their opponents, as these contentions bear on the exercise of our discretionary disclosure authority.

#### A. BOC Waiver Proposals

12. Various BOCs suggest alternative approaches to filing their SCIS model on the record. Bell Atlantic and BellSouth claim that providing a detailed description and

explanation of SCIS for the public record should satisfy Commission cost support requirements.<sup>21</sup> Bell Atlantic agrees to respond to questions from the Commission staff regarding these materials.<sup>22</sup>

13. In their oppositions, MCI and AT&T find unacceptable all of the alternative approaches to review of SCIS suggested by the BOCs.<sup>23</sup> MCI argues that none of the BOC proposals allows access customers the ability to review the inputs, algorithms, and outputs of the cost models used to derive the rates that they will pay.<sup>24</sup> Specifically, MCI claims that with respect to Ameritech Transmittal 557, MCI found nonproprietary descriptions useless for rate review and asserts they do not satisfy the *TRP Order*. MCI contends that the BOCs do not indicate that they will provide extension of this information.<sup>25</sup> AT&T further claims that the Commission must also protect the public interest by assuring that the ONA tariffs are cost based, just, reasonable, and nondiscriminatory. AT&T argues that the alternatives proposed by the BOCs do not strike an appropriate balance between proprietary interests and public interests because they would significantly diminish or preclude the Commission's access to and use of information concerning the operations of the models and their results.<sup>26</sup> AT&T concludes that the BOCs fail to demonstrate that their alternative proposals will correct the serious deficiencies in their tariff support caused by the failure to furnish cost models.<sup>27</sup>

14. Several BOCs offer to conduct seminars for Commission staff that would explain the theory and operation of SCIS software and related algorithms.<sup>28</sup> The carriers suggest various approaches to demonstrating SCIS. BellSouth and US West agree to include the use of data from their filings in their respective demonstrations.<sup>29</sup> NYNEX and Southwestern would include demonstrations of SCIS results using fictitious data. However, the Commission would have the opportunity to request the carriers to process data contained in their filings in the presence of Commission staff.<sup>30</sup>

15. Bell Atlantic states that its workshop could involve actual input data from its ONA tariff filing, but would avoid the disclosure of confidential vendor information.<sup>31</sup> To avoid creating an agency record that might involve FOIA, US West states that it will leave no software, documentation, or demonstration results with the Bureau's staff.<sup>32</sup> Bell Atlantic and US West express a willingness to organize additional workshops for third parties using prototype data.<sup>33</sup> Bell Atlantic notes that such workshops have been conducted in connection with state commission proceedings and have been well received.<sup>34</sup> US

<sup>19</sup> *SCIS In Camera Order*, *supra*.

<sup>20</sup> The Bureau informally encouraged the BOCs and petitioners to pursue an informal negotiation process to afford intervenors access to these materials under procedures to protect proprietary materials. BOCs and petitioners did not reach an agreement on how to accommodate their diverse interests in disclosure.

<sup>21</sup> Bell Atlantic Petition at 4; BellSouth Petition at 8.

<sup>22</sup> Bell Atlantic Petition at 4.

<sup>23</sup> AT&T has submitted comments only as an interexchange carrier, not in its role as a switch vendor.

<sup>24</sup> MCI Comments at 3.

<sup>25</sup> MCI Comments at 3-4.

<sup>26</sup> AT&T Comments at 5.

<sup>27</sup> AT&T Comments at 6.

<sup>28</sup> Bell Atlantic Petition at 5; BellSouth Petition at 7; NYNEX

Petition at 5, n. 7; Southwestern Bell Petition at 4. Such seminars or demonstrations have been provided in several state proceedings.

<sup>29</sup> BellSouth Petition at 7-8; US West Petition at 7.

<sup>30</sup> NYNEX Petition at 5, n.7; Southwestern Bell Petition at 4.

<sup>31</sup> Bell Atlantic Petition at 5; *see also* NYNEX Petition at 5, n.7; Southwestern Bell Petition at 4.

<sup>32</sup> US West Petition at 7. The Trade Secrets Act, argues US West, prohibits the Bureau's staff from disclosing any proprietary information obtained during a workshop.

<sup>33</sup> Bell Atlantic Petition at 5; US West Petition at 7.

<sup>34</sup> Bell Atlantic Petition at 5.

West would require intervenors to execute appropriate protective agreements.<sup>35</sup> Ericsson agrees to formulate "dummy" data for use in a workshop on SCIS and SCM for the Bureau or intervenors (or both).<sup>36</sup> AT&T, however, argues that the workshop option is inadequate because the BOCs would use fictitious data rather than the information actually used by the carriers to develop their rates.<sup>37</sup>

#### B. Commenters' Reactions

16. Ericsson urges the Bureau to consider the alternatives to a filing on the record that were proposed by many of the BOCs. Ericsson offers support and cooperation for any alternative that prevents disclosure of Ericsson proprietary information.<sup>38</sup> Northern Telecom agrees to consider specific proposals for public disclosure of information related to SCIS and SCM if the Commission establishes appropriate protections for the use and disclosure of the company's confidential and proprietary information.<sup>39</sup>

17. Northern Telecom reminds the Commission that it entered into written confidentiality agreements with Bellcore and US West to prevent disclosure of its confidential and proprietary information.<sup>40</sup> Furthermore, Northern Telecom claims that it would reevaluate providing information to Bellcore and US West if the information becomes public. According to Northern Telecom, it has no obligation to continue to supply this information.<sup>41</sup> According to several carriers, the SCIS model cannot function without such vendor-provided information.<sup>42</sup>

18. The reason for its concern regarding the confidentiality of pricing data, explains Ericsson, is that the BOCs award virtually all major purchases and projects through competitive sealed bids. In addition, claims Ericsson, the highly competitive nature of the central office and switching equipment market leads to narrow profit margins and magnifies the significance of pricing and pricing strategies in this market.<sup>43</sup> Northern Telecom explains that with its proprietary information, competitors would have detailed, non-public price and technical information concerning the company's current and planned switching products.<sup>44</sup>

19. Ericsson also argues that because BOCs make most of their switch purchases through competitive, sealed bids, knowledge of a competitor's pricing allows a company to bid slightly under its competitors, but maximize the company's profits.<sup>45</sup> Northern Telecom explains that a com-

petitor with detailed, non-public price and technical information concerning the company's current and planned switching products would be able to determine the costs of specific interface types and service types on each of the company's central office switching systems, and the competitor could modify its pricing structure accordingly.<sup>46</sup>

20. MCI asserts that it would agree to review of SCIS and SCM model inputs, algorithms and settings, and outputs used to derive ONA rates subject to a protective order and nondisclosure agreement with the BOCs. MCI requires that it perform the review at its own designated location, but the carrier expresses a willingness to limit the review to a select number of MCI employees. MCI suggests that the BOCs could deliver the material to a designated MCI location after execution of nondisclosure agreements and retrieve the material after the Commission releases a final Order.<sup>47</sup> Similarly, AT&T contends that the BOCs could provide all general processing algorithms, outputs and a full description of the methodology through which their models develop unit costs for service features but not any vendor-specific input data and algorithms used in the models. AT&T Comments at 6-7. AT&T points to the nondisclosure agreements between Bellcore and US West and switch manufacturers, and asserts that intervenors can assess the validity of the BOCs' cost methodologies without vendor proprietary information. AT&T suggests that the Commission prescribe a protective order restricting the use of the data solely to the ONA proceeding. Access to this data would also require a nondisclosure agreement. AT&T contends "any pleadings that disclose information accorded confidential status under the protective order should be filed with the Commission under seal as provided for in Section 0.459 of the Commission's rules. 47 C.F.R. § 0.459." AT&T Comments at 7.

#### C. BellCore Proposal

21. The Bureau on November 19, 1991 informally requested Bellcore and the BOCs to seek a negotiated solution to these disclosure issues. Bellcore circulated to petitioners on December 13 a letter suggesting two mutually exclusive alternatives for protected SCIS disclosure -- an independent audit or limited, on-premises access to the SCIS software by parties willing to sign a nondisclosure agreement (which is not furnished in the December 13 letter).<sup>48</sup> Under the first of the two mutually exclusive Bellcore options, assuming a majority of petitioners con-

<sup>35</sup> US West Petition at 8.

<sup>36</sup> Ericsson Comments at 9.

<sup>37</sup> AT&T Comments at 5-6.

<sup>38</sup> Ericsson Comments at 9.

<sup>39</sup> Northern Telecom Comments at 5-6.

<sup>40</sup> Northern Telecom Comments at 4-5; see also Bell Atlantic Petition at 3; BellSouth Petition at 4; NYNEX Petition at 3. Bell Atlantic and US West claim that if they disclosed vendor information to the public, Bellcore would by their action be in violation of contractual obligations to protect the confidentiality of the vendors' data. Bell Atlantic Petition at 3; US West Petition at 6.

<sup>41</sup> Northern Telecom Comments at 5; see also Ericsson Comments at 9.

<sup>42</sup> Bell Atlantic Petition at 3; US West Petition at 6; Bell

Atlantic Petition at 4; BellSouth Petition at 5.

<sup>43</sup> *Id.* at 5-6.

<sup>44</sup> Northern Telecom Comments at 4.

<sup>45</sup> Ericsson Comments at 5.

<sup>46</sup> Northern Telecom Comments at 4.

<sup>47</sup> MCI Comments at 5.

<sup>48</sup> US West was not a party to the Bellcore December 13 Letter. Rather, US West developed a separate proposal for disclosure of its SCM model. Letter from A. Lim, US West, to Chief, Common Carrier Bureau, December 19, 1991. US West's proposal is in all substantive respects identical to the Bellcore proposal, and MCI's and Sprint's responses are in all substantive respects identical to their responses to Bellcore's proposal. Letter from L. Blosser, MCI, to A. Lim, US West, December 18, 1991; Letter from L. Kastenbaum, Sprint, to A. Lim, US West, December 18, 1991. AT&T discussed its opposition to SCM in its letter regarding SCIS.

sent, an auditor would be selected by Bellcore and (tentatively) accorded access to proprietary vendor data. Bellcore apparently contemplates that such consent should be binding on other parties. The auditor would then review the model's procedures, evaluate inputs and outputs, and perform sensitivity analyses.

22. The second Bellcore option, limited on-site SCIS review, arises as an alternative only if a majority of petitioners do not accept the audit proposal. In that event, Bellcore would provide three persons designated by each petitioner a maximum of three days' access to SCIS at the BOC premises. The SCIS model and documentation would be redacted of vendor data, unless the vendors agreed to provide such data on the strength of nondisclosure agreements reached with individual petitioners. (No such agreement is provided as part of the proposal to which petitioners are asked to respond.) The BOC employees would conduct SCIS runs, under specifications submitted by petitioners three days in advance. Bellcore candidly states it cannot predict what vendors will agree to in their negotiations with petitioners should this approach be adopted.

23. AT&T and MCI both responded that Bellcore's audit proposal provides inadequate access to the SCIS model.<sup>49</sup> MCI criticizes the BOCs' delay in submitting a proposal long after MCI requested on-site inspection of SCIS. MCI objects to the proposal because if a majority of petitioners elect the independent audit option, all petitioners will be precluded from on-site review. MCI states that it finds an independent audit unacceptable under any circumstances, and also considers Bellcore's proposal for on-site review unacceptable. AT&T suggests that the BOCs allow on-site review as a supplement to any auditor report. The auditor's report, argues AT&T, should include the BOCs' unit switching costs for each study area for each type of switching technology, aggregated for switch vendors. According to MCI, an acceptable on-site review would allow for two visits - one to review documentation and BOC inputs, and the other for MCI to provide its own input data for sensitivity analyses. Sprint refuses to allow its rights to review SCIS to be determined by a majority vote of other interested parties. Allnet questions whether SCIS contains any trade secret information, given that Bellcore has not sought any patent or copyright protection. Alternatively, D.C. PSC responds to Bellcore's proposal by voting for the limited on site review alternative.<sup>50</sup>

#### D. State Proceedings

24. Several BOCs also attach illustrative nondisclosure agreements, employed to enable review of SCIS in state ratemaking proceedings, to their petitions for waiver of the TRP Order. After an initial review of the complexity of Ameritech's SCIS materials, the Bureau desired more information concerning the practice of state public utility commissions in dealing with ratemaking based on SCIS. The Bureau requested that each BOC file supplemental materials describing the extent and method of SCIS disclosure in state proceedings, and the BOCs filed this information on November 13, 1991.<sup>51</sup>

25. These supplemental materials show that BOCs have not provided what they consider proprietary SCIS information to state regulators absent a protective order or nondisclosure agreement.<sup>52</sup> State public utility commissions requested and received a variety of SCIS information. Some state commissions had access to the SCIS model and full documentation.<sup>53</sup> In addition, in one state proceeding an apparently extensive, independent audit was conducted of the internal validity of Pacific's SCIS model; because the audit was conducted under a rigorous protective order and nondisclosure agreements, however, the regulatory authority's public report of the audit to the California state legislature was essentially devoid of descriptive detail.<sup>54</sup> Other state commissions saw only redacted versions of the model, stripped of the specific carrier or vendor data necessary to track the rate development process; portions of the documentation; or some type of summary overview of the model.<sup>55</sup>

26. Third party intervenors at the state level have received varied access to SCIS in the form of written materials and presentations. This ranges from a presentation by Bellcore on behalf of NYNEX, which was limited to written materials prepared by Bellcore, to disclosure of the SCM model and documentation by US West in Oregon. In the latter instance, the Oregon Public Utility Commission (PUC) granted a blanket protective order and third parties were required to sign a nondisclosure agreement.<sup>56</sup> In general, third parties received more limited access to SCIS documentation and related materials than state commissions.<sup>57</sup>

<sup>49</sup> See Letter from L. Blosser, MCI to J. Britt, Bellcore, December 18, 1991; Letter from T. Norris, AT&T to Chief, Common Carrier Bureau, December 18, 1991. See also Letter from L. Blosser, MCI to S. Wiggins, FCC, December 17, 1991; Letter from M. Yourshaw, ANPA, to Chief, Common Carrier Bureau, December 23, 1991 (opposing both Bellcore alternatives and supporting MCI's counterproposal); Letter from P. Rohrbach, WilTel, to Chief, Common Carrier Bureau, December 20, 1991 (opposing both Bellcore alternatives and supporting AT&T's and MCI's counterproposals); Letter from L. Kastenbaum, Sprint, to J. Britt, Bellcore, December 19, 1991 (opposing both Bellcore alternatives); Letter from R. Morris, Allnet, to Chief, Common Carrier Bureau, December 23, 1991 (opposing both Bellcore alternatives).

<sup>50</sup> Letter from D. Avery, General Counsel, D.C. PSC, to J.

Britt, Bellcore, December 17, 1991.

<sup>51</sup> These submissions are cited as "Reports." i.e., Bell Atlantic Report at --.

<sup>52</sup> The Florida Public Utilities Commission has not yet ruled on a BellSouth motion of confidentiality in one of its proceedings.

<sup>53</sup> See Ameritech Report, Pacific Report, Southwestern Bell Report, and US West Report.

<sup>54</sup> See Pacific Report.

<sup>55</sup> See Bell Atlantic Report at 1-2, NYNEX Report at 1-2, Southwestern Bell Report at 1, US West Report at 3.

<sup>56</sup> NYNEX Report at 2; US West Report at 2.

<sup>57</sup> See generally Reports of Ameritech, NYNEX, Southwestern, and US West.

## IV. DISCUSSION

## A. Discretionary Agency Disclosure: Legal Authority

27. Because BSE rates are developed by the allocation of switching equipment capacity and costs at a level of specificity that entails reliance on proprietary data in the form of computer models, the investigation of BSE rates requires that we address two competing but fundamental policies. On one hand, access to relevant information enables interested persons to participate fully in a Section 204 investigation. On the other hand is the long-protected interest in maintaining the private, confidential status of commercial and financial information, including trade secrets.<sup>58</sup> Having determined in the *SCIS In Camera Order* that the model and related materials are categorically exempt from disclosure under FOIA, we now address this inherent dilemma from the perspective of discretionary agency disclosure.<sup>59</sup>

28. The courts have required that agencies contemplating discretionary disclosure of competitively sensitive materials first consider (1) whether disclosure of the detailed information will aid the discharge of the agency's functions; (2) the extent of harm to the public, as well as information submitters, from the release of competitively sensitive materials; and (3) whether less extensive disclosure may provide the public with adequate knowledge, while protecting proprietary information.<sup>60</sup>

29. Thus, the Bureau must make several sequential determinations before assertedly proprietary materials may be disclosed. As to the materials exempt from mandatory FOIA disclosure, a determination must be made whether public interest considerations argue for the exercise of the Commission's discretionary disclosure authority. This requires that we determine the extent and specific manner in which ONA ratemaking is dependent on SCIS and related materials, and what detriments to the public interest arise from less than the customary disclosure of such materials. If these public interest considerations are significant, we must next weigh the harm that could accrue to public and private interests from disclosure against the public interest in access to the materials. This would enable the Bureau to consider if some form of discretionary disclosure is warranted, notwithstanding a determination of proprietary status, and if so, how best to accomplish a useful degree of disclosure without unduly compromising the proprietary materials involved.<sup>61</sup> The determination whether and how to provide some form of access to the materials will thus depend both on this weighing of interests, and the practicability of various

alternatives by which the materials to be disclosed may be "redacted" or otherwise partitioned to reconcile these conflicting interests.<sup>62</sup>

<sup>58</sup> See, e.g., Trade Secrets Act, 18 U.S.C. § 1905; Freedom of Information Act, 5 U.S.C. § 552.

<sup>59</sup> We use the term "competitively sensitive" rather than "proprietary" or "trade secret" in the discussion because, as explained in the *In Camera Order*, we have determined the SCIS materials involved are exempt from mandatory FOIA disclosure under two distinct, separately conclusive grounds: (1) the language of the statute, which exempts trade secrets and proprietary materials, and (2) judicial interpretations that recognize the anticipated harmful effects of disclosure on agency functions as an independent ground for exemption.

<sup>60</sup> *Pennzoil Company v. FPC*, 534 F.2d 627, 631-32 (5th Cir. 1976) (*Pennzoil*).

<sup>61</sup> Examination of the SCIS model's use in the context of a

specific carrier's ratemaking process has assisted our determination whether disclosure of SCIS would significantly impair agency functions, such that elements of SCIS or related materials not competitively sensitive should be exempted from mandatory FOIA disclosure on this ground. See, e.g., *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 944 n.5 (D.C. Cir. 1991); *9 to 5 Organization for Women Office Workers v. Board of Governors*, 721 F.2d 1, 9 (1st Cir. 1983).

<sup>62</sup> See *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, 627 F.2d 392, 401-02 (D.C. Cir. 1980).

## B. Public Interest Considerations

### 1 General

30. Cost support materials filed with tariffs are routinely available for public inspection under the Commission's Rules,<sup>63</sup> and the Commission has departed from this practice only with great reluctance. The few departures from routine disclosure have tended more toward effecting disclosure, under safeguards for proprietary material,<sup>64</sup> than toward the categorical denial of public access.<sup>65</sup> This practice comports with both the Administrative Procedure Act's fundamental interest in administrative decisions reached upon a public record, and the strong statutory preference for disclosure established by the FOIA. Indeed, the Commission's broad discretion to disclose sensitive materials was confirmed even before Congressional enactment of the FOIA. In the *Schreiber* decision,<sup>66</sup> the Supreme Court determined that:

Grants of agency authority comparable in scope to § 4(j) [of the Communications Act] have been held to authorize public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests involved.

*Schreiber*, 381 U.S. at 291-92 (notes omitted).

31. Two decades later, in the context of the Shared Network Facilities Arrangement (SNFA) investigation, the Commission determined that inter-carrier SNFA contracts to which MCI sought access, while exempt from mandatory FOIA disclosure because they pose the risk of competitive harm, could be disclosed because relevant to the Commission's investigation of SNFA contracts and special access rates.<sup>67</sup> The Commission therefore directed the Office of General Counsel to impose a protective order that would prevent MCI, the party seeking access to confidential SNFA materials, from revealing that information to third parties or using it for competitive purposes.<sup>68</sup> Following a remand of that proceeding on other grounds, the Commission again determined to disclose additional contracts required to be filed by carriers under investigation.<sup>69</sup>

### 2 ONA-Specific Considerations

32. Paragraphs 42 and 44 of the *Part 69 ONA Order*, codified in Appendix A of that Order as revised Section 61.49(h) of the Commission's Rules, require carriers to develop direct costs for BSEs unbundled from local switching by applying a consistent cost methodology. The Order also requires the submission of supporting workpapers to establish the selected cost support methodology. So far as intervenors are concerned, however, the SCIS model appears to be an undisclosed set of technically complex and variable workpapers which have the capability to alter substantially the BSE rates through variations both obvious and subtle. As explained below, our *in camera* inspection generally confirms the intervenors' perspective.

33. The general considerations and past Commission practice favoring disclosure of tariff cost support materials are reinforced when, as here, the tariffs in question both implement a major Commission policy initiative, and establish rate benchmarks that will be used for the subsequent application of price cap regulation in the ONA context. As noted, the *Part 69 ONA Order* endorsed pricing flexibility for BOCs providing these newly unbundled elements, but also iterated the importance of sufficient, and adequately specific, cost support, both to avoid discriminatory and excess charges as well as the possibility of predatorily low pricing.<sup>70</sup>

34. The Bureau expects that disclosure of detailed SCIS materials, including BOC inputs and aggregated SCIS output reports, to parties to the investigation under nondisclosure safeguards would add significantly to the agency's understanding of the application of SCIS by the carriers charged with developing initial ONA rates. This judgment is based on our own *in camera* review of SCIS, which discloses its sensitivity to changes in BOC raw data inputs (cost of money, switch pricing, etc.) as well as certain parameter choices made by BOCs when actually running the model (e.g., average or incremental costing), and on review of the other regions' ONA tariffs and petitions directed at them.<sup>71</sup>

35. At the same time, broad disclosure of these materials could obstruct or defeat the very purposes for which ONA was adopted. We are persuaded to this assessment of

<sup>63</sup> 47 C.F.R. § 0.455(b)(11); 47 C.F.R. § 61.49.

<sup>64</sup> See 47 C.F.R. § 0.457(d); 47 C.F.R. § 0.461(c).

<sup>65</sup> See *Western Union Telegraph Company and American Satellite Company, Requests for Inspection of American Telephone and Telegraph Company's Documents*, FOIA Control Nos. 85-29 and 85-37, FCC 85-378, Memorandum Opinion and Order, released July 23, 1985 (*Western Union Order*); Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, 4 FCC Rcd 1662 (Com.Car.Bur. 1988) (*1989 TRP Order*); Annual 1989 Access Tariff Filings, Petitions for Waiver Regarding Proprietary Treatment of Information Contained in the 1989 Tariff Review Plan, 3 FCC Rcd 7200 (Com.Car.Bur. 1988) (*Confidentiality Order*). The LECs specifically objected to several TRP tables, including one that required total company cost analysis (including the removal of non-regulated costs and costs subject to separations), and a table that required interstate cost analysis, including the allocation of costs among access elements. *Confidentiality Order*, 3 FCC Rcd at 7200. See also *AT&T Communications, Tariff F.C.C. No. 16, Request for Waiver of the Commission's Rules*, 4 FCC Rcd 2426

(Com.Car.Bur. 1989) (*FTS 2000 Order*).

<sup>66</sup> *Federal Communications Commission v. Schreiber*, 381 U.S. 279 (1965) (*Schreiber*).

<sup>67</sup> *MCI Telecommunications Corp., Memorandum Opinion and Order*, FOIA Control No. 84-144, FCC No. 85-266, released May 17, 1985 (*MCI FOIA Order*).

<sup>68</sup> *MCI Telecommunications Corp., Modified Protective Order*, FOIA Control No. 84-144, FCC No. 85-266, released July 5, 1985 (*MCI Protective Order*).

<sup>69</sup> *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase I, 4 FCC Rcd 687 (1989) (*SNFA Filing Requirements Order*).

<sup>70</sup> *Part 69 ONA Order*, 6 FCC Rcd at 4531.

<sup>71</sup> Petitioners addressing the November 1 tariffs observe that the unit investment and direct cost figures derived by individual BOCs, all relying on SCIS, vary substantially. The Ameritech unit investment for ANI, for example, is almost 20 times greater than that calculated by Southwestern Bell, for example. MCI Petition (Nov. 26) at 17. It is of evident importance to determine the extent to which such variations arise from SCIS, and to what extent they derive from other elements in the BOCs' rate development procedures.

risk not primarily by the substantial measures adopted by Bellcore to protect the confidentiality of its model, nor by the corresponding provisions in its licensing agreements. These, combined with other evidence, establish the proprietary nature of the materials involved, and the substantiality of competitive harm to SCIS, but not necessarily any overriding public detriment. Were the public interest sufficiently compelling, therefore, these concerns might not preclude a determination to disclose SCIS. Rather, we are concerned that the ultimate effect of disclosure would be to sacrifice the objectives that ONA seeks to implement.

36. The public disclosure of SCIS and related materials poses a substantial risk, both of competitive harm to the parties directly affected and of general harm to the public. With respect to switch vendors especially, it appears that disclosure of their inputs or technology-specific SCIS output reports would expose them to competitive harm in the switching system market, so that the probable effect of unguarded SCIS disclosure would be to terminate switch vendors' participation and quickly render the model useless. Even if switch vendors were able to continue their involvement with SCIS, broad disclosure of the model's fundamental algorithms would substantially reduce its value to Bellcore.

37. Of central import to the public, unrestricted disclosure of SCIS could seriously compromise or end the usefulness of SCIS and switch vendor information in ratemaking proceedings in both state and interstate jurisdictions. Such switch vendor information will probably be essential to develop any rates for ONA services that accurately reflect costs.

### 3 Conclusion

38. The *Ameritech TRP Waiver Order* describes the competing interests in disclosure of SCIS and the asserted proprietary nature of SCIS elements, as they appeared to us on the basis of wholly non-proprietary descriptions. The difficulty of reconciling these interests springs in large measure from the necessity of reliance on SCIS or a similar model to develop unit investment data for individual BSEs. Our subsequent *in camera* review of Ameritech's SCIS model (and later, of other BOCs' models) was undertaken to reach a better informed judgment of contentions that SCIS materials generally should be accorded confidential treatment, and so expedite ONA implementation.<sup>72</sup>

39. We have now concluded that SCIS should be subjected to the fullest practicable examination by parties to the investigation, consistent with protection of competitively sensitive materials, to assure thorough review of these elements of the ONA rate development process.

<sup>72</sup> Deferring consideration of these matters until all regions have submitted their ONA tariffs would only further delay the implementation of ONA, and review of multiple SCIS-based filings is not necessary to determine issues of public disclosure.... Our limited, immediate purpose is to acquire sufficient understanding of the SCIS model to determine whether its proprietary aspects can be effectively preserved, while still affording the interested public a useful opportunity to review the application of the model to these filings.

There is a strong public interest, both generally in developing the new services to be furthered by ONA and, more narrowly, in the setting of reasonable prices for ONA services that will not constrain that process. The broad public purposes of the Commission's ONA initiative will unquestionably be far better served if prospective customers of these offerings are enabled to contribute their specialized expertise to the resolution of issues in the ONA tariff investigation. At the same time, while the potential providers of ONA services are well situated to contribute to this process, we are convinced that the effective initial implementation of ONA under reasonable rates and provisions, as well as the continued evolution of the ONA process, require that the SCIS model and related proprietary materials not be fundamentally compromised.

### C. Bellcore Disclosure Proposal

40. A Bellcore proposal circulated December 13 attempts to resolve the difficulties arising from cost support premised on proprietary materials, but it exhibits several deficiencies. It is not clear from the Bellcore audit proposal whether the analysis performed would be technology-specific, or how petitioners could use the auditor's results to examine particular BOCs' rate development practices. The scope of the proposed Bellcore audit is also made contingent upon the switch vendors' subsequent determination whether to provide the auditor with proprietary information. The Bellcore audit approach thus seeks to limit any disclosure provided to individual parties to the scope of a majority determination, and fails to specify the terms of the agreement under which the audit will be disclosed. The on-premises inspection of SCIS proposed as a contingent, mutually exclusive alternative is also subjected to practical constraints that would seriously constrain parties' ability to review these materials. MCI has complained that the BOCs' proposal both represents an effort further to stall meaningful review, and sharply constrains the scope of on-premises SCIS trial runs.<sup>73</sup> We are concerned, as well, that the on-premises inspection alternative leaves the extent of vendor data disclosure to individual parties' negotiating skills.

41. Apart from its substantive deficiencies, the Bellcore proposal potentially sets petitioners against each other both on the initial choice between mutually exclusive alternatives, and then on secondary issues such as differential access to switch vendor data. The proposal to reduce administrative process to a majority vote between two choices crafted by the carriers' agent that petitioners oppose is not an arrangement the Bureau can endorse. Indeed, even the audit report described by Bellcore, when filed with the Commission under seal, would still not include any data considered proprietary by the vendors. This amounts to a less useful mode of disclosure for staff

*Ameritech TRP Waiver Order*, paras. 13-14. The courts have generally preferred that agencies undertake such *in camera* review of materials subject to FOIA, especially in technically complex areas. See *Lead Industries v. OSHA*, 610 F.2d 70, 88 (2d Cir. 1988); *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977).  
<sup>73</sup> Letter from L. Blosser, MCI, to S. Wiggins, Tariff Division, December 17, 1991.



review than the Ameritech *in camera* submission. We therefore turn to the practicalities of a balanced disclosure crafted to the circumstances of the major elements at issue — switch vendor inputs; BOC inputs; the operational SCIS software, and documentation of its processing algorithms; and SCIS output reports.

#### D. Analysis of Discretionary Disclosure

42. We therefore seek to establish a disclosure procedure firmly committed to the maximum extent of public participation in the ONA tariff investigation that can be reconciled with adequate protection of proprietary materials. This determination reflects the interests in disclosure and the particular purposes sought by the ONA initiative, which include the determination by carriers formulating ONA plans of offerings expected to be useful to enhanced service providers and others. It has been substantially strengthened by our *in camera* review of SCIS in the Ameritech context, as well as preliminary review of the other BOCs' ONA filings.<sup>74</sup> Our *in camera* review of the SCIS model, considered both as a discrete rate development tool and as applied in the context of the BOCs' overall ONA rate development process, has confirmed the presence and importance of multiple decision points and data elements in the SCIS-based aspects of the cost development process, including: (1) BOC and switch vendor inputs to SCIS; (2) the algorithms constituting the model proper; and (3) variation in the operation (and results) of SCIS cost studies introduced by user-determined parameters. In the present context, we are free to explain this determination in detail only to the extent it can be described on the basis of non-proprietary materials, and have combined the explanation of these aspects of SCIS with our discretionary disclosure analysis.

#### 1. Description of SCIS<sup>75</sup>

43. The precursor of the SCIS model was developed when the advent of computerized electronic switching systems to replace mechanical switching coincided with the need to price multiple new service offerings, and the increased regulatory emphasis on more open, competitive structures for both services and service providers. An increasingly dynamic telecommunications market required, both for efficient market strategy and for compliance with regulatory strictures, that carriers be able to apportion the cost of shared switching resources among a rapidly increasing, and evolving, menu of services. The current SCIS software model encompasses 25 software modules in order to apportion such investments for eight switching system technologies provided by five switch manufacturers.

44. For each switching technology, SCIS software modules replicate the internal operations of the several components in that particular vendor's line — including central office switches, remote and tandem switching en-

ties, and including ISDN and SS7 capabilities when provided. These software modules are not static; there have been over 30 SCIS software releases since 1985 to reflect new technologies, engineering rules, switching architectures, and feature or price revisions. Approximately 35 to 40 percent of the system code (*i.e.*, over a third of the 900,000 or more lines in existence) must be revised on an annual basis.

45. To generate an investment figure for a specific BSE, the internal operations and architecture of individual vendors' switching technologies are first examined by the SCIS Model Office Equation Module (MOM), which identifies equipment costs associated with the least common denominators of costs — the basic investment drivers of the switch or "cost primitives." Examples include the cost of a central processor millisecond, and the non-usage-sensitive cost per line termination in the switch.<sup>76</sup> The MOM individually analyzes each office specified by the BOC, and then develops a weighted average output for each cost primitive that is specific to the particular switch technology.

46. The cost primitives are next converted by the Vertical Service Module (VSM) within SCIS into investment figures for the resources (*e.g.*, real time, memory, signalling packets) needed to implement a specific feature or function in the switch. The VSM model, among other tasks, must identify possible tariff structures for the feature or function, and create an actual feature-specific costing algorithm using MOM cost primitives, user-entered inputs, and vendor-supplied switch resource measurements. The VSM model must be adjusted as necessary to reflect whether any part of the feature is already recovered by an existing tariff structure, and separate, additional algorithms may be necessary to generate feature investment output in a format appropriate to the possible tariff structure. The result of applying individual feature cost algorithms to cost primitives that are specific to a given technology is expressed as a cost per line, per call, per customer, *etc.*, for a given technology. The analyses performed by MOM and VSM combine to provide these SCIS output reports, which are then further aggregated and refined by the BOC to develop investment costs for, *e.g.*, BSE rate elements. As the NYNEX nonproprietary description notes, the BOC develops its own algorithms in a process separate from SCIS, in order to weight the costs of a service in a manner that reflects the extent to which different switch technologies are used in its territory to offer the service, and:

Depending on the switch technology mix, average results could vary among user communities. In fact, these cost differentials could be magnified if a particular feature costs considerably more, or less in a particular switch technology.

<sup>74</sup> Compare 1989 TRP Waiver Order, 3 FCC 2d 7200, 7202 (1988) (suppression of data "would prevent other parties from commenting on the proposed rates, thus depriving the Bureau of a valuable resource in our review of annual filings.")

<sup>75</sup> The following description is taken from the non-proprietary description in the NYNEX Description and Justification for Transmittal 57, Appendix B; similar non-proprietary descriptions were supplied by other BOCs in their November 1 transmittals. Other non-proprietary materials consulted include

"Bellcore's Switching Cost Information System (SCIS) Cost Model: A Practical Approach to a Complex Problem," paper submitted June 20, 1990 by V. Schmid-Bielenberg, Director, Switching and Network Cost Analysis (Bellcore), to Symposium on Marginal Cost Techniques for Telephone Services, National Regulatory Research Institute.

<sup>76</sup> A list of cost primitives is provided by the non-proprietary description of SCIS included in the November 1 tariffs. See, *e.g.*, NYNEX Transmittal 57, D&J Appendix B at Fig. 4.



will be provided an opportunity to submit queries for the auditor. The BOC parties will have an opportunity to object to particular queries.

#### V. CONCLUSION AND ORDERING CLAUSES

64. In the *SCIS In Camera Order*, we determined that the SCIS model licensed by Bellcore to the BOCs, the SCM model, related BOC inputs and parameter selections, associated input data from switch vendors, and technology-specific SCIS outputs, constitute confidential materials that are exempt from disclosure under Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Commission's implementing regulations, 47 C.F.R. §§ 0.457(d), 0.459. The *SCIS In Camera Order* granted the BOC waiver petitions insofar as the petitions sought an exemption from the requirement that cost support materials be filed as public documents that are routinely open to public inspection. The same considerations require that all pleadings and reports related to competitively sensitive materials will also be exempt from disclosure under Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Commission's implementing regulations, 47 C.F.R. §§ 0.457(d), 0.459.

65. Accordingly, IT IS ORDERED, that pleadings dealing with competitively sensitive materials as identified in this Order shall be submitted under protective cover.

66. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL DESIGNATE a single, independent auditor they will retain to examine all SCIS-related software and documentation, in the form submitted to the Commission pursuant to the *SCIS In Camera Order*, no later than February 7, 1992. US West may, at its option, submit its SCM model for review as part of this audit, or it may retain a separate auditor to examine its SCM model on the same schedule.

67. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL PROVIDE the independent auditor with all SCIS-related software and documentation, in the form submitted to the Commission pursuant to the *SCIS In Camera Order*, no later than February 14, 1992.

68. IT IS FURTHER ORDERED that parties of record SHALL SUBMIT to the Commission all relevant queries to be directed to the independent auditor no later than March 9, 1992.

69. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL FILE with the Commission any comments on queries to be directed to the independent auditor no later than March 16, 1992.

70. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL FILE with the Commission SCIS-related software and documentation, with confidential material redacted to the extent provided in Attachment B of this Order, no later than February 21, 1992.

71. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL PROVIDE parties signing the nondisclosure agreement, attached hereto as Attachment A, with redacted SCIS software and related material as described in this Order, no later than February 28, 1992.

72. IT IS FURTHER ORDERED, that the independent auditor SHALL SUBMIT an *in camera* description of the scope of the proposed audit to the Commission no later than February 28, 1992. This audit should include a validation of the SCIS model's methodology, a list of model parameters subject to BOC variation, and a validation of the method used by each BOC to convert technology-specific SCIS output reports into aggregated outputs. These submissions shall be made under protective cover to the Commission.

73. IT IS FURTHER ORDERED, that the Motion to Accept Late Submission of Materials for *In Camera* Inspection, filed January 8, 1992 by NYNEX IS GRANTED.

#### FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone  
Chief, Common Carrier Bureau

Attachment A: Model Nondisclosure Agreement for Access to Redacted SCIS Model

#### ATTACHMENT A Nondisclosure Agreement to Govern Competitively Sensitive SCIS-Related Information

1. This nondisclosure and protective agreement ("agreement") is effective this \_\_\_\_ day of \_\_\_\_, 1992, by and between \_\_\_\_ [BOC] and its counsel of record ["BOC"] and \_\_\_\_ [the party] and its counsel of record in all phases of the investigation of the competitively sensitive aspects of tariffs<sup>69</sup> filed in the ONA Proceeding (Transmittal Nos. \_\_\_\_), including administrative and judicial review. Materials subject to this agreement may not be disclosed after conclusion of the tariff investigation and must be returned to [BOC].

2. Whereas, [the party] has requested that [BOC] provide certain information and produce certain documents relied on in preparing the referenced transmittals; and the Bureau has identified elements of the SCIS model that may be provided to parties to the investigation, subject to the protection of a nondisclosure agreement:

3. Whereas, the information requested by [the party] may constitute BOC's competitively sensitive commercial or financial information, including, but not limited to, cost of service information;

<sup>69</sup> The term "competitively sensitive" as it is used in this agreement has the meaning stated in footnote 59 of Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, DA 91-129, released January 31, 1992 (Com.Car.Bur.)